JOHORE REPORTS

[ORIGINAL CIVIL JURISDICTION]
THORNE, J.
[APPELLATE CIVIL JURISDICTION]
HUGGARD, C. J. and
TERRELL, J.
January 19, 1935.

GEE HUP & CO. ....Appellants (Defendants)
vs.
YEO SWEE HERN TRADING AS CHOP YONG BEE HUAT ..... Respondent (Plaintiff)

[JOHORE CIVIL APPEAL No. 2 of 1934]

Bailments—Negligence of bailee for reward —onus of proof.

Where a chattel is entrusted to the care of a bailee for reward and destroyed through his negligence, all the bailor has to do is to allege and prove that the chattel has been so entrusted and has not been returned when demanded. It is unnecessary for the bailor to establish a prima facie case of negligence on the part of the bailee or his agent. The onus is upon the bailee to show that he has taken reasonable and proper care for the security and delivery of the bailment.

Action tried before Thorne, J. on 9th and 16th September, 1934.

The facts and arguments appear from the judgment of the Chief Justice below.

Fung for the Plaintiff.

Johannes for the defendant.

Cur. Ad. Vult.

THORNE, J.—The plaintiff is a rubber dealer who carries on business at Pontian Besar, and the defendant, Lim Ah Leong, carries on business under the style of Gee Hup & Co. and is the owner of a smokehouse in which he is in the habit of smoking uncured rubber for reward.

The parties began dealing on the 21st December, 1933, and the course of dealing appears to be that every few days the plaintiff sent to the defendant a quantity of uncured rubber, and the lorry on its return journey took back such of the rubber previously delivered as had been smoked and was ready for delivery. As soon as the rubber was ready for delivery the defendant informed the plaintiff whereupon the plaintiff sent any rubber he had on hand to be cured and fetched away any part of the rubber which was ready for delivery.

The plaintiff says that the price agreed between them as the defendant's reward was at first 35 cents per picul, but this rate was varied from time to time.

The defendant swore that his charge to the plaintiff was 40 cents per picul, and that at the material date his charge was still 40 cents per picul.

On the 22nd April, 1934 at about 3.30 p.m. the defendant's smokehouse caught fire and was burned down together with some adjoining buildings. At that date the plaintiff alleges that the defendant had in his possession 47 piculs and 87 kattis of sheet rubber which he had delivered to the defendant to be smoked.

Of this total quantity, 6 piculs and 10 kattis formed part of a quantity which had been delivered to the defendant on the 18th of April. On the 20th of April 33 piculs and 94 kattis were returned to the plaintiff leaving 6 piculs and 10 kattis which were retained by the defendant for the reason that the curing had not been completed. On the same day, that is 20th April, the plaintiff delivered to the defendant a further 41 piculs and 77 kattis for treatment. The plaintiff applied to the defendant for delivery to him of this quantity of rubber, but the defendant declined to return it for the reason that the plaintiff's rubber had been destroyed in the fire which burned down his smokehouse. The plaintiff therefore sues the defendant to recover the value of his rubber and a profit of two dollars per picul.

The plaintiff alleges against the defendant that the smokehouse was burned down by reason of the negligence of the defendant, his servants, or agents.

The defendant admitted that he was in possession of 47 piculs and 87 kattis of sheet rubber belonging to the plaintiff which was destroyed by fire, and he denied liability to the plaintiff for the reason that the fire was not attributable to any negligence on the part of himself, his servants, or agents.

The defendant required of the plaintiff further particulars of the allegations of negligence which the plaintiff supplied by letter of the 14th July (Put in and marked Exhibit "E"). The acts of negligence alleged are (1) Failure to exercise proper care in the working of the smokehouse, and (2) failure to keep a fire extinguisher to minimise the risk of loss by fire.

At the conclusion of his opening Counsel for the plaintiff submitted that the onus was upon the defendant, but in the result I held that as the plaintiff had alleged negligence against the defendant he must lead evidence to establish a *prima facie* case of negligence in order to place the onus on the defendant.

I should say here that I share the view ultimately expressed at a later stage of the case by Counsel for the plaintiff that the allegation of negligence in paragraph (6) of the Plaint is unnecessary, and that the plaintiff would have been well advised to sue in detinue, leaving to the defendant by his defence to explain how it came about that he was unable to return to the plaintiff the rubber which was entrusted to him, but it seems to me that as the plaintiff had based his

claim upon an allegation of negligence he must establish that affirmative proposition against the defendant.

The plaintiff gave evidence and sought to establish that the defendant attempted to smoke the rubber too rapidly, and that in order to do this the defendant had too large a fire in the furnace of his smokehouse, but this evidence appears to be all hearsay. He called a witness named Senang bin Mayar, who was a coolie employed by the defendant at the time of the fire and who has since been dismissed by the defendant. This witness swore that the flues leading from the furnace into the smokehouse had not been cleaned for 10 or 12 days, which resulted in an accumulation of soot in the flues. He says also that the door of the furnace had been left open at the time of the fire, and he attributed the fire to these facts. He explained that the furnaces were built on ground-level with no air space under the fireplace with the result that when the door of the furnace was left open, greater draught resulted, and he surmised that in consequence of this greater draught in this furnace flames were carried into the smokehouse and thus set fire to the woodwork and the sheets of rubber inside the smokehouse.

This seems to me to establish a *prima facie* case of negligence against the defendant, and notwithstanding the submission of Counsel for the defendant that there was no case to meet I hold to the contrary.

The defendant gave evidence. His manner was distinctly unsatisfactory. He prevaricated and did not give me the impression of being entirely frank. So far as his evidence appears to be unsatisfactory with regard to the construction of the smokehouse and the cleaning of the flues, I think there was some misunderstanding between the defendant's Counsel and himself, and I excuse the defendant on this ground for any contradiction in these matters which may appear in his evidence. He called a witness named Teng Nuang Teck, a builder, who constructed the smokehouse which was burned down, and who has since constructed another smokehouse of the same pattern for the defendant on the same site. I accept the evidence of this witness and hold that the smokehouse was reasonably well built.

The defendant could offer no explanation whatever as to the cause of the fire. In answer to me he stated "It is essential that one man should be on duty every moment of the day at the smokehouse when the fire (in the furnace) is alright," and again later, "I agree that the man who tends the fire should never leave the fireplace." He said further that his coolie Seet Chong Poh had been detailed for duty to watch the fire in the furnace at the time the smokehouse caught fire, but that he was not at the smokehouse at the time having been away in the store for about 35 minutes when the fire was discovered. The coolie Seet Chong Poh swore that he was on duty at the time of the fire, it being the practice for coolies to do this for four hours at a time, thus confirming the defendant's evidence that the furnace should never be left unattended. He says that he was in the store when the fire broke out, that he last tended the fire at about 3 o'clock, and that he had been away from the furnace for about half an hour when it was discovered that the smokehouse was on fire.

Upon this evidence I hold it to be established against the defendant that he was guilty of negligence in that the fire in the furnace was left unattended whereas on his own admission the exercise of due care required that the furnaces should never be left. I hold, therefore, that the plaintiff succeeds in establishing against the defendant negligence in the working of the smokehouse, and that he is entitled to recover.

With regard to the allegation of negligence on the ground that the defendant failed to keep a fire extinguisher, I hold that the plaintiff fails for the reason that there is no evidence to establish that it is the usual practice for persons engaged in this business to maintain fire extinguishers, and it may well be that in view of the highly inflammable nature of the structure itself and of its contents that no fire extinguisher would be effective once the smokehouse has caught fire, and that is probably the reason for the admission on the part of the defendant that it is essential to keep constant watch in order to prevent fire spreading from the furnace into the smokehouse.

I hold it established that at the time the smokehouse was discovered to be on fire the door of the furnace was open, and to this extent I accept the evidence of the witness Senang bin Mayar, and I do not accept the evidence of the defendant. Exactly what the result of this may have been, and to what extent it contributed to the fire I am unable to decide, for the reason that no evidence was called except to establish that the draught through the furnace into the smokehouse was increased by reason of the door of the furnace being left open.

The witness Karthegesu, a detective investigating officer, was called, who proved that the defendant told him at the time that the door of the furnace had been opened and in consequence fire came out and set fire to a store nearby, from which the fire spread back to the smokehouse. I accept the evidence of this witness which confirms my view that the defendant was not truthful when he stated that the door of the

furnace was shut at the time the smokehouse caught fire.

With regard to the evidence as to the cleaning of the flues, I find it inconclusive, and in my view a finding of fact is of no assistance for the reason that the evidence called for the plaintiff amounts to no more than surmise on the part of the plaintiff that the failure to clean the flues was the cause of the fire.

From the pleadings it would appear at least impliedly that at the time of the fire the plaintiff's rubber was in the smokehouse and was destroyed by fire at the same time as the smokehouse. The defendant does not by his defence allege that the plaintiff's rubber was not in the smokehouse at the time of the fire, but when he gave evidence the defendant swore that the whole of the plaintiff's rubber was in a wooden store adjoining the smokehouse, and that this store caught fire by the spread of flames from the burning smokehouse.

The defendant called no other evidence to prove where the plaintiff's rubber was at the time of the fire. I do not accept the defendant's evidence that the whole of the plaintiff's rubber was in the store. Although the defendant's books were destroyed in the fire he could have called evidence of the coolies to prove where the rubber was, but no questions were asked of either of the coolies who were called. It is to be remembered that the plaintiff's rubber had been in the defendant's possession as to 6 piculs and 10 kattis since the 18th of April, and the remainder since the 20th of April. If the 6 piculs and 10 kattis were not completely smoked on the 20th it is unlikely they would have been removed from the smokehouse before the 22nd. If upon the other hand these 6 piculs and 10 kattis had been removed it is probable that the defendant would have put some at least of the remainder of the plaintiff's rubber in the smokehouse before the 22nd April.

If, however, I am wrong in my finding of fact and the rubber was in fact in the store house at the time of the fire, I hold that the defendant was guilty of negligence in storing the plaintiff's rubber in a wooden store which had been built in dangerous proximity to the smokehouse. It seems to me that the fact that the store was destroyed by fire which spread from the smokehouse establishes that the store was in dangerous proximity, and if the defendant sought to excuse himself he should have adduced evidence to establish that this was not the case. He failed to do so however, and although I think the witness Senang bin Mayar was exaggerating when he described how near the store was to the smokehouse, I hold that a clearance of 23 feet between the two buildings was inadequate. If the defendant's evidence on this point is correct in my view the mere fact of placing rubber in this store was an act of negligence which renders him liable to the plaintiff regardless of the question as to what was the origin of the fire which destroyed the smokehouse. I hold therefore that whether the rubber was in the smokehouse or in the store at the time of the occurrence of the fire the defendant was guilty of want of reasonable care and is liable to the plaintiff.

It was agreed between Counsel during the hearing that I should not take evidence as to the value of the rubber, but that if necessary a reference should be made to the Registrar to assess the quantum of damages sustained by the plaintiff. I refer the case therefore to the Registrar to enquire and report as to the amount of the loss sustained by the plaintiff.

The measure of damages will be the value of the 47 piculs and 87 kattis of Diamond Smoked Sheet. This value will be ascertained by finding the market price of that quantity of rubber on such date subsequent to the 22nd of April as the plaintiff would, in the ordinary course of business, sell this quantity of rubber. I have no information as to where the plaintiff sells his rubber, but in order to realise the market price it would be necessary for the plaintiff to transport the rubber from the defendant's smokehouse to the place of sale; to pay the defendant's charges for smoking the rubber at the rate of 40 cents per picul; and to pay any duty handling or other charges necessarily incurred by the plaintiff in the ordinary course of business to transport the rubber to the place of sale. The measure of damages will be the market price at which the plaintiff could have sold this rubber after a reasonable number of days subsequently to the 22nd April, less the cost calculated on the lines I have suggested of conveying the rubber to the place of sale.

Judgment will be entered for the plaintiff for the amount so found with the costs of this action to be taxed.

From the above judgment the defendants appealed and the appeal came on for hearing before Sir Walter Huggard, Chief Justice, Straits Settlements, and Mr. Justice Terrell on the 17th December, 1934. The Court of Appeal delivered judgment on the 16th January 1935.

Knowles (*Johannes* with him) for the Appellant (Defendant).

Cobbett for the Respondent (Plaintiff).

Cur. Adv. Vult.

HUGGARD, C.J.—In this appeal there is little conflict as to the material facts.

The Plaintiff is a rubber dealer and the Defendants were the owners of a smoke-house. For some time prior to the 22nd April, 1934, the Plaintiff had been in the habit of sending to the Defendants quantities of uncured rubber to be

smoked. On the 22nd April, 1934, the Defendants were in possession of 47 piculs and 87 katties of the Plaintiff's rubber, and on that date a fire occurred which resulted in the destruction of the Defendants' smoke-house and other adjoining buildings and of the whole of the Plaintiff's rubber.

In his Plaint the Plaintiff alleged that the fire was caused by the negligence of the Defendants or their servants or agents, and in the Court below the learned trial Judge held that, in view of the way in which the Plaintiff had framed his pleadings, the onus was upon him to establish a *prima facie* case of negligence in order to shift the onus on to the Defendants.

At the conclusion of the Plaintiff's case it was submitted that the Defendants had no case to answer, but the learned trial Judge rejected this submission and called on the Defendants. Having heard both sides the learned Judge held it to be established that the fire in the Defendants' furnace had been left unattended. He held therefore that the Plaintiff had discharged the onus of showing that the Defendants had been negligent in the working of the smoke-house and that the Plaintiff was entitled to recover.

From this decision the Defendants have appealed. Their main contention is that, even if the furnace had in fact been left unattended for a short period, that in itself did not amount to negligence on their part. Mr. Knowles contends on their behalf that the Plaintiff should have gone further and should have proved that the temporary absence of the watchman whose duty it was to attend to the furnace conduced to the fire; in other words, that the fire would not have occurred if the watchman had been at his post.

For the Respondent-Plaintiff, on the other hand, it is argued that the Defendants were bailees for reward, that notwithstanding the way in which the Plaint had been drawn the onus was on the Defendants to show that proper care had been exercised, and that this onus had not been discharged.

In support of his argument on behalf of the Defendant-Appellants Mr. Knowles cited a number of authorities, amongst which may be mentioned:

Hammack v. *White*, 142 E.R. 926.

Callender v. *Carlton Iron Co., Ltd.*, 9 T.L.R. 646.

Wakelin v. *London & South Western Railway Co.*, 12 A.C. 41.

Blyth v. *The Company of Proprietors of the Birmingham Waterworks*, 156 E.R. 1047.

McKenzie v. *Corporation of the Township of Chilliwack*, (1912) A.C. 888.

Wing v. *London General Omnibus Co*, (1909) 2 K.B. 652.

Now all these cases are cases arising out of tort, and the principle they establish may be accepted without question. The principle is that in all such cases the onus is on the plaintiff to prove affirmatively that the defendant has been guilty of negligence and that that negligence has been the proximate cause of the loss or injury complained of. As was stated in the Judgment of the Court of Appeal in *Callender* v. *Carlton Co., Ltd., (supra)*—

> "The Plaintiff had to prove affirmatively, not only negligence by the defendants, but negligence conducive to the accident."

And in *Wakelin* v. *London & South Western Railway Co. (supra)*, in the House of Lords, Lord Halsbury said:—

> "It is incumbent upon the plaintiff . . . to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act or some negligent omission, to which the injury complained of.....is attributable."

But in my view the principle established by this line of cases has no application to the facts in the present case. It is, I think, quite clear that the Defendants here were bailees for reward of the Plaintiff's rubber, and therefore what we have to consider is the legal position applicable to the relationship of bailor and bailee for reward.

The Contract Enactment of the Federated Malay States which is, of course, taken from the Indian Contract Act, is in force in the State of Johore, and the sections of that Enactment which are relevant to the facts of the present case are sections 151 and 152 which read as follows:—

> "151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.
>
> "152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151."

It is, I think, a necessary inference, from these sections that where loss or injury has occurred to goods in the custody of a bailee, the onus is upon him to show that the loss or injury occurred without negligence on his part. The position is stated as follows in *Pollock & Mulla* (5th Edition) at page 611:—

> "In cases governed by the provision of sections 151 and 152, the loss or damage of goods entrusted to a bailee is *prima*

facie evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee."

Now the common law of England as to bailments is substantially the same as the statute law on that subject in force in this State. It is therefore of assistance to turn to English authorities dealing with the subject.

The following general proposition appears in *Halsbury's* Laws of England, 2nd Edition, Vol. I, at page 751:—

"When a chattel intrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property."

This proposition is supported by ample authority, amongst the cases cited being:—

Mackenzie v. *Cox*, 173 E.R. 987.

Phippe v. *New Claridge's Hotel (Limited)*, 22 T.L.R. 49.

Coldman v. *Hill*, (1919) 1 K.B. 443.

For further support reference may be made to the opinions expressed in the House of Lords by Lord Loreburn, L.C., and by Lord Halsbury in the case of *Morison, Pollexfen & Blair* v. *Walton*. Lord Loreburn said:—

"Here is a bailee who, in violation of his contract, omits an important precaution, found by the learned judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discover at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrongdoing he must make that loss good."

And Lord Halsbury said:—

"It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

This case of *Morison, Pollexfen & Blair* v. *Walton* is not reported, but the above observations are cited by both Buckley, L.J., and Kennedy, L.J., in *Joseph Travers & Sons, Limited* v. *Cooper*, (1915) 1 K.B. at pages 87 to 90.

I am of opinion therefore that, it having been admitted by the Defendants in their Statement of Defence that 47 piculs and 87 katties of rubber, the property of the Plaintiff, had been entrusted to them for the purpose of being smoked, and that it had been destroyed by fire, the onus was upon the Defendants to show that they had taken reasonable and proper care of the rubber and that its destruction had occurred without negligence on their part. I have already stated that in the Court below the learned trial Judge held, that having regard to the fact that the Plaintiff had in his Plaint specifically alleged negligence, the onus was upon him to establish a *prima facie* case of negligence on the part of the Defendants. I do not find myself able to agree with the view taken by the learned trial Judge on this point. In my opinion it was quite unnecessary for the Plaintiff to allege or prove negligence on the part of the Defendants. All he had to do was to allege and, if necessary, prove that the rubber had been entrusted to the Defendants for the purpose of being smoked and that it had not been returned when demanded. I do not consider that the insertion in the Plaint of an unnecessary allegation is sufficient to shift on to the Plaintiff the burden of proof which, in all the circumstances of the case and having regard to the relationship existing between the parties, clearly in my opinion lay on the Defendants.

The only question remaining, therefore, is whether in the Court below the Defendants discharged the onus which lay upon them. On the findings of fact of the learned trial Judge I am of opinion that this question must obviously be answered in the negative. In the Court below, the onus having been held to be on the Plaintiff to prove affirmatively that the Defendants had been guilty of negligence, the learned trial Judge found that negligence had been established and that the Plaintiff was entitled to recover. In face of this result it seems clear that if the learned trial Judge had held, as I think he should have held, that the onus lay on the Defendants he must necessarily have found that the Defendants had failed to discharge that onus. The evidence of Lim Ah Leong (who is the proprietor of the Defendant Company) was to the effect that it was essential that a man should be on duty at the smoke-house every moment of the day, that this man should never leave the fireplace, but that in fact the man in charge of the furnace on the day on which the fire occurred had been absent from his post for about 35 minutes prior to the occurrence.

In these circumstances I think that the Plaintiff was entitled to succeed in the Court below.

I would dismiss this appeal with costs. The deposit will be paid out to the Respondent or his solicitors in part satisfaction of the costs.

TERRELL, J. — The appellants were the owners of a smoke house at Pontian Besar. The respondent is a rubber dealer and from time to time sent the appellants a quantity of uncured

rubber for smoking. In return for this service the appellants were paid 40 cents per picul. They were accordingly in the position of bailees for reward.

On the 22nd April, 1934, the appellants had in their possession a quantity of the respondent's rubber and on the afternoon of that day a fire broke out on the appellants' premises and the smoke house and some adjoining premises and all their contents, including the respondent's rubber, were destroyed.

The respondent, plaintiff in the Court below, accordingly sued the appellants for the value of the rubber and his loss of profit. The Plaint, after setting out the facts, alleged that the plaintiff's rubber had been destroyed through the negligence of the defendants or that of their servants or agents.

There was considerable argument in the Court below as to whether the action was properly framed. The defence admitted that the plaintiff's rubber had been destroyed by fire, but traversed the allegation of negligence. Plaintiff's counsel accordingly submitted that the onus was the defendants' and that they must begin. The defendants however argued that as the plaintiff had pleaded negligence and given particulars of such negligence, he must prove his allegations. In answer to this plaintiff submitted that the plea of negligence was not essential and that if no evidence were called he must succeed. The learned trial Judge, however, ruled against him and held that on his pleadings the plaintiff must prove some lack of due care on the part of the defendants, or, in other words, that the onus was on the plaintiff and that he must begin. In his final reply plaintiff's counsel, accepting the learned Judge's ruling, submitted that his pleadings were wrong, that he should not have pleaded negligence but sued in detinue. The trial resulted in the learned Judge finding that the plaintiff had established a case of negligence against the defendants and he gave judgment for the relief claimed. The defendants thereupon appealed to the Court of Appeal. There were seven grounds of appeal, but they may be summarised in the argument that there was not sufficient evidence to support the learned Judge's finding that the plaintiff had discharged the onus of proving negligence against the defendants. On the appeal the respondent, as in the Court below, submitted that the onus was on the defendants to prove that they were not negligent. I need not go into the evidence in detail—it is sufficient to refer to the evidence which the defendant, Lim Ah Leong, gave in answer to the Court. He said:—

> "I think the cause of the fire cannot be explained.
>
> "If my smokehouse were properly attended to, it should not take fire. There must have been a reason for the fire. I do not know the reason. It is essential that one man should be on duty always, every moment of the day at the smoke house when the fire is alight."

The coolie who was supposed to be on duty was one Seet Chong Poh: he was called as a witness and admitted that he had been away from the smoke house for half an hour when the fire broke out.

If the onus was on the defendants to prove that they were not negligent, the evidence quoted above is amply sufficient to show that such onus has not been discharged.

It follows, therefore, that the most important point for decision on this appeal is whether the learned trial Judge was right in his finding that, as the plaintiff had based his claim upon an allegation of negligence, he must establish that affirmative proposition against the defendants.

It will be convenient to consider what a contract of bailment for reward implies. It means that one person, the bailor, has entrusted property to another person, the bailee, for the purpose of either keeping such property in safe custody or of doing something with such property, the bailor paying the bailee for such service. In return the bailee impliedly agrees to use due care and diligence in keeping the property and to return it to the bailor in due course according to the terms of the contract. A failure to exercise due care and diligence is negligence, and an issue of negligence must therefore necessarily arise if the basis of the bailor's action is a breach of duty by the bailee in carrying out his part of the bargain.

It is true that the plaintiff could have sued in detinue in the alternative. This was done in the case of *Coldman* v. *Hill*, 1919, 1 K.B. p. 443, where the defendant was bailee of some cattle which had been stolen. The County Court Judge held that they were stolen without any default on the part of the defendant. But the defendant never reported the theft and made no efforts to recover the cattle after they had been stolen. It is pointed out by Banks, L.J., at p. 449, that in detinue the defendant must have succeeded as he was not responsible for the theft. His obligations as bailee, however, continued, and as he did not discharge them, the plaintiff was entitled to recover in his action on the case for negligence.

In the present case the plaintiff was obviously not in a position to know very much about the circumstances of the loss except that the smoke house was destroyed by fire, and I think that a bare recital of this fact was all that the plaintiff was required to give by way of particulars of negligence. In the form given in *Bullen & Leake*, 8th Ed. p. 341, the plaintiff's claim is framed in this way, and in my opinion the form of the plaintiff's pleading in this action was correct. But it does not follow from this that the onus of proving various details establishing negligence on the part of the defendants rested on the plaintiff. It has long been established in England that in case of a loss the onus is on the bailee to prove that it occurred through no ordinary want of care

on his part, and I am satisfied that under the provisions of the Contract Enactment which has been adopted in Johore, the law on the subject is the same as in England. Such a rule is only reasonable, since, if goods are lost while in a bailee's custody, the bailor is not likely to be aware of the exact circumstances which must be peculiarly within the bailee's knowledge. A good example of this rule is the case of *Reeve* v. *Palmer*, 5 C.B. (N.S.) p. 84, where an attorney was held liable for the loss of his client's deed, it not having been shown how the loss occurred. In the Court of Common Pleas, Cockburn C.J., said: "The jury have found that he lost it, and I am of opinion that that must be taken to mean in the absence of any explanation that he lost it for want of that due and proper care which it was his duty to apply to the keeping of it, unless it is qualified by circumstances showing that the loss of the deed could not have been prevented by the application of ordinary care." The decision was confirmed by the Exchequer Chamber. The action in that case was in detinue, but the same principles apply when the action is founded on negligence. This is established by the case of *Pollexfen & Blair* v. *Walton* (unreported) which was decided in the House of Lords in 1907, and by the case of *Joseph Travers & Sons, Ltd.* v. *Cooper*, 1915, 1 K.B. p. 73, in which the principle laid down in the House of Lords case is followed. In each of these cases a barge or lighter had been sunk, resulting in the loss of the plaintiff's goods. In each case the defendant was a bailee for reward and it was his duty to have a man on board the barge or lighter and that man had been absent. It was very difficult to say in either case how the accident had occurred. The law on the subject is stated quite clearly by Lord Loreburn in the House of Lords case in a passage which is quoted by Kennedy, L.J., in the latter case at p. 90. "Here is a bailee" says Lord Loreburn "who in violation of his contract, omits an important precaution found by the learned Judge upon ample evidence to be necessary for the safety of the thing bailed to him, and which might have prevented the loss. And his breach of contract has the additional effect of making it impossible to ascertain with precision, and difficult to discover at all, what was the true cause of the loss. I cannot think it is good law that in such circumstances he should be permitted to saddle upon the parties who have not broken their contract the duty of explaining how things went wrong. It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong doing, he must make that loss good." In the same case Lord Halsbury said "It appears to me that here was a bailment made to a particular person, a bailment for hire or reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested on him."

In the present case the defendants evidently recognised it was a duty to have someone continually on the spot while the fire was burning. As they neglected that duty it is not competent for them to argue that if the coolie had been there it would have made no difference.

It is a commonplace that in the course of a particular trial the onus may shift several times [see *per* Bowen L.J. in *Medewar* v. *Grand Hotel Co.*, (1911) 2 K.B. p. 11 at p. 23]. In a case like the present I am of opinion that as soon as it was admitted that the defendant had been entrusted with the plaintiff's rubber for reward and had lost it through fire in his smoke house, the plaintiff was entitled to succeed if no evidence had been called at all. The defendants accordingly had to prove that the loss was not due to any want of care and diligence on their part. If they could have established that there was no negligence on their part, they were entitled to the verdict. In a case, for instance, where the building in which the goods were stored was blown down by a high wind the bailee was held not to be liable, *Searle* v. *Laverick*, L.R. 9 Q.B. p. 122, and if goods have been destroyed by fire the bailee is entitled to succeed if he can show that the fire was accidental and not due to any negligence on his part. This is in accordance with the principle that although the bailee is liable for his or his servants' negligence, he is not an insurer, see *Watkins* v. *Cottell*, 1916, 1 K.B. p. 10, in which case furniture in the course of removal from one house to another was destroyed through the defendant's lorry catching fire. It was proved that the fire was not due to any negligence on the part of the defendant and accordingly he was held not to be liable for the damage. If however the bailee cannot satisfy the Court to the contrary, negligence will be presumed and the bailor will be entitled to recover.

On these issues the Evidence Enactment merely codifies the well recognised principles of English Law; section 102 provides that the burden of proof lies on that person who would fail if no evidence at all were given on either side, section 103 that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, and section 106 that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Applying these provisions to the present case, it was for the defendants to satisfy the Court that they used due care and diligence and that the loss was not due to any negligence on their part. In this contention they have failed. I think that the learned trial Judge was wrong in placing the onus on the plaintiff, and I express no opinion as to whether, as found by the learned Judge, he did actually discharge such onus.

I would dismiss the appeal with costs. The deposit should be paid out to the respondent or his solicitors.

Appeal dismissed.